

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7 TAMARA L. WADE, )  
8 Plaintiff, ) No. CV-09-0215-CI  
9 v. ) ORDER DENYING PLAINTIFF'S  
10 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
11 of Social Security, ) AND GRANTING DEFENDANT'S  
12 Defendant. ) MOTION FOR SUMMARY JUDGMENT

14 BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct.  
15 Rec. 13, 16.) Attorney Maureen R. Rosette represents Tamara Wade  
16 (Plaintiff); Special Assistant United States Attorney Michael Howard  
17 represents the Commissioner of Social Security (Defendant). The  
18 parties have consented to proceed before a magistrate judge. (Ct.  
19 Rec. 8.) After reviewing the administrative record and briefs filed  
20 by the parties, the court **DENIES** Plaintiff's Motion for Summary  
21 Judgment, and directs entry of judgment for Defendant.

## JURISDICTION

Plaintiff protectively filed for Supplemental Security Income (SSI) on December 20, 2006. (Tr. 86.) She alleged disability due to bipolar disorder, scoliosis and a hearing impairment, with an onset date of October 1, 2000. (Tr. 90.) Benefits were denied initially and on reconsideration. On August 17, 2007, Plaintiff

1 timely requested a hearing before an administrative law judge (ALJ),  
 2 which was held before ALJ R.S. Chester on October 7, 2008. (Tr. 16,  
 3 28-53.) Plaintiff, who was represented by counsel, and vocational  
 4 expert Deborah LaPoint (VE) testified. The ALJ denied benefits on  
 5 November 5, 2008, and the Appeals Council denied review. (Tr. 1-5,  
 6 16-27.) The instant matter is before this court pursuant to 42  
 7 U.S.C. § 405(g).

#### 8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 10 court set out the standard of review:

11 A district court's order upholding the Commissioner's  
 12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 14 Commissioner may be reversed only if it is not supported  
 15 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 16 Substantial evidence is defined as being more than a mere  
 17 scintilla, but less than a preponderance. *Id.* at 1098.  
 18 Put another way, substantial evidence is such relevant  
 19 evidence as a reasonable mind might accept as adequate to  
 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 389, 401 (1971). If the evidence is susceptible to more  
 20 than one rational interpretation, the court may not  
 21 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of  
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,  
 23 resolving conflicts in medical testimony, and resolving  
 24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 25 Cir. 1995). The ALJ's determinations of law are reviewed  
 26 *de novo*, although deference is owed to a reasonable  
 27 construction of the applicable statutes. *McNatt v. Apfel*,  
 28 201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve  
 30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 31 supports more than one rational interpretation, the court may not  
 32 substitute its judgment for that of the Commissioner. *Tackett*, 180  
 33

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
 2 Nevertheless, a decision supported by substantial evidence will  
 3 still be set aside if the proper legal standards were not applied in  
 4 weighing the evidence and making the decision. *Brawner v. Secretary*  
 5 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
 6 there is substantial evidence to support the administrative  
 7 findings, or if there is conflicting evidence that will support a  
 8 finding of either disability or non-disability, the finding of the  
 9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
 10 1230 (9<sup>th</sup> Cir. 1987).

#### 11                   **SEQUENTIAL EVALUATION**

12         Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 13 requirements necessary to establish disability:

14         Under the Social Security Act, individuals who are  
 15 "under a disability" are eligible to receive benefits. 42  
 16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 17 medically determinable physical or mental impairment"  
 18 which prevents one from engaging "in any substantial  
 19 gainful activity" and is expected to result in death or  
 20 last "for a continuous period of not less than 12 months."  
 21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 22 from "anatomical, physiological, or psychological  
 23 abnormalities which are demonstrable by medically  
 24 acceptable clinical and laboratory diagnostic techniques."  
 25 42 U.S.C. § 423(d)(3). The Act also provides that a  
 26 claimant will be eligible for benefits only if his  
 27 impairments "are of such severity that he is not only  
 28 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

29         In evaluating whether a claimant suffers from a  
 30 disability, an ALJ must apply a five-step sequential  
 31 inquiry addressing both components of the definition,  
 32 until a question is answered affirmatively or negatively  
 33 in such a way that an ultimate determination can be made.  
 34 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 35 claimant bears the burden of proving that [s]he is

disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of [his] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents her from engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a), 416.920(a). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

## **STATEMENT OF THE CASE**

20 The facts of the case are set forth in detail in the transcript  
21 of proceedings and are briefly summarized here. At the time of the  
22 hearing, Plaintiff was 42 years old, unmarried, and living with her  
23 16 year daughter and 13 year old son in a two-story single dwelling  
24 house. (Tr. 33, 36.) Plaintiff testified her son is a special  
25 needs child with intestinal problems. She indicated recent surgery  
26 has improved her son's condition. (Tr. 35.) She stated she helps  
27 him with homework and works with the school to address his needs.

1 (Tr. 34-36.) Plaintiff testified she has a high school diploma and  
2 past work experience as a cook and bartender. She stated she quit  
3 her last job as a bartender because she became overwhelmed and cried  
4 all the time, and her scoliosis kept her from working. She  
5 indicated she received unemployment for about six months. (Tr. 37-  
6 39.) Plaintiff testified she could stand for one half hour, had  
7 left hand cramps and left arm numbness; she could carry ten pounds,  
8 walk three to five blocks, and sit for an hour. (Tr. 40-42, 45.)  
9 She said she no longer does many outside activities, and gets  
10 overwhelmed and starts crying when doing household chores. (Tr.  
11 42.) However, she reported she has five grandchildren who live in  
12 town, and she takes care of a one month old grandchild once a week.  
13 (Tr. 44.) She testified she cannot work because of depression,  
14 anxiety and scoliosis. (Tr. 37, 39.)

15 **ADMINISTRATIVE DECISION**

16 At step one, ALJ Chester found Plaintiff had not engaged in  
17 substantial gainful activity since the alleged onset date. (Tr.  
18 18.) At step two, he found Plaintiff had severe impairments of  
19 bipolar disorder and anxiety. (*Id.*) Noting that medical records  
20 from treating physicians did not reflect complaints of or treatment  
21 for back pain, the ALJ found scoliosis imposed minimal limitations  
22 on Plaintiff's ability to perform work-related activities and was,  
23 therefore, a non-severe impairment. He also found her hearing  
24 impairment was non-severe. (Tr. 22.) At step three, he found  
25 Plaintiff's impairments, alone and in combination, did not meet or  
26 medically equal one of the listed impairments in 20 C.F.R., Appendix  
27 1, Subpart P, Regulations No. 4 (Listings). (*Id.*) The ALJ  
28

1 summarized Plaintiff's testimony and concluded her statements  
2 regarding the severity of her functional limitations were not fully  
3 credible. (Tr. 23-24.) At step four, he determined she had the  
4 residual functional capacity (RFC) to perform medium work, but she  
5 could not work in a noisy environment and should avoid noisy  
6 machinery and heights due to her impaired hearing. He determined her  
7 work should require only superficial contact with the public and co-  
8 workers. (Tr. 23.) Based on this RFC and VE testimony, the ALJ  
9 concluded Plaintiff could perform her past work as a short order  
10 cook. Finding that it was uncertain her past work rose to the level  
11 of substantial gainful activity, the ALJ proceeded to step five and  
12 found Plaintiff's non-exertional limitations would not significantly  
13 erode the occupational base of unskilled, medium level work. (Tr.  
14 26.) Referencing the Medical-Vocational Guidelines, 20 C.F.R. Part  
15 404, Subpart P, Appendix 2, he concluded Plaintiff was not disabled,  
16 as defined by the Social Security Act, at any time from December 20,  
17 2006, through the date of his decision. (*Id.*)

## **ISSUES**

19 The question is whether the ALJ's decision is supported by  
20 substantial evidence and free of legal error. Plaintiff argues the  
21 ALJ erred when he rejected the opinions of examining psychologist  
22 Dennis Pollack, Ph.D., in favor of the opinions of Joyce Everhart,  
23 Ph.D.; improperly disregarded limitations assessed by non-examining  
24 psychologist James Bailey, Ph.D.; and failed to include mental  
25 limitations supported by the record in the final RFC determination.  
26 (Ct. Rec. 14 at 10-13.)

## DISCUSSION

#### A. Medical Source Opinions

In disability proceedings, the ALJ evaluates the medical evidence submitted and must explain the weight given to the opinions of accepted medical sources in the record. The Regulations distinguish among the opinions of three types of accepted medical sources: (1) sources who have treated the claimant; (2) sources who have examined the claimant; and (3) sources who have neither examined nor treated the claimant, but express their opinion based upon a review of the claimant's medical records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a non-examining reviewing or consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). The Commissioner must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of a treating or examining physician." *Lester*, 81 F.3d at 830. If the medical opinion is contradicted, it can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record. *Andrews*, 53 F.3d at 1043.

22 State agency psychologists are treated as expert non-examining  
23 sources in disability proceedings. The ALJ may not ignore these  
24 opinions and must explain the weight given. *SSR 96-6p*. The opinion  
25 of a non-examining medical expert or state agency consultant by  
26 itself cannot be considered substantial evidence that supports the  
27 rejection of a treating or examining physician. *Lester*, 81 F.3d at

1 831. However, the opinions of non-examining reviewing psychologists  
2 may serve as substantial evidence when supported by and consistent  
3 with other evidence in the record. *Andrews*, 53 F.3d at 1041.

Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain as "specific," "legitimate" reasons for disregarding a treating or examining physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir. 1995); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989). Medical opinions based on a claimant's subjective complaints may be rejected where the claimant's credibility has been properly discounted.<sup>1</sup> *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001). The claimant's credibility is also an appropriate factor weighed in the evaluation. *Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). Where an ALJ determines a treating or examining physician's stated opinion is materially inconsistent with the physician's own treatment notes, legitimate grounds exist for considering the

<sup>1</sup> The ALJ's credibility findings are specific, "clear and convincing" and unchallenged. (Tr. 24.) He properly noted instances of inconsistency between Plaintiff's statements to medical providers and her testimony, her failure to take effective medication consistently, and the lack of medical evidence to support allegations of physical limitations. (*Id.*) These are proper reasons supported by substantial evidence. See, e.g., *Flaten*, 44 F.3d at 1463-64.

purpose for which the doctor's report was obtained and for rejecting the inconsistent, unsupported opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996). Rejection of an examining medical source opinion is specific and legitimate where the medical source's opinion is not supported by his own medical records and/or objective data. *Tommasetti v. Astrue*, 533 F.3d 1035 (9<sup>th</sup> Cir. 2008).

7 Dr. Pollack evaluated Plaintiff in September 2008; he  
8 administered objective tests for intelligence (WAIS), personality  
9 (MMPI-2), an obsessive compulsive inventory, and neuropsychological  
10 and malingering tests. His narrative report describes test results  
11 indicating average intelligence; possible overstatement of  
12 difficulties; mild to moderate range of obsession/compulsion; and  
13 normal range in the neuropsychological and malingering tests. (Tr.  
14 262-64.) His Axis III diagnoses were based on Plaintiff's self-  
15 report of bipolar disorder, anxiety, hearing loss, depression, panic  
16 attacks, asthma, chronic acid esophagus, dyslipidemia, hearing lost  
17 and abnormal weight gain. (Tr. 264.) He assigned a global  
18 assessment of functioning (GAF) score of 60 (moderate).

19 The ALJ noted "[t]he body of Dr. Pollack's report indicates  
20 questionable validity scales on the MMPI-2" and inconsistencies  
21 between Plaintiff's self-report and assessed limitations. He also  
22 cited the GAF score as inconsistent with the moderate and marked  
23 limitations in pace and performance.<sup>2</sup> (Tr. 25.) These are specific

<sup>2</sup> The Global Assessment of Functioning (GAF) scale is a common tool used by psychologists for tracking and evaluating the overall psychological functioning of a patient. A score of 51-60 indicates

1 legitimate reasons to reject Dr. Pollack's medical opinion.  
2 Further, the evidence of overstatement of symptoms detracts from the  
3 validity of test results. It also is noted on review Plaintiff's  
4 report to Dr. Pollack that she quit her bartender job because the  
5 business closed is inconsistent with her statement to the ALJ that  
6 she quit because of depression and uncontrollable crying. (Tr. 24,  
7 38, 260.) This evidence of unreliable self-report is a legitimate  
8 reason to reject a medical opinion based on the claimant's symptom  
9 complaints. *Tonapetyan*, 242 F.3d at 1149. The ALJ's reasoning that  
10 Dr. Pollack's opinion is frequently sought by claimant's counsel  
11 because he consistently finds this marked limitation is erroneous

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12 "moderate symptoms (e.g., flat affect and circumstantial speech,  
13 occasional panic attacks) OR moderate difficulty in social,  
14 occupational, or school functioning ( e.g., no friends, unable to  
15 keep a job.)" A score of 61-70 indicates "some mild symptoms,  
16 (e.g., depressed mood and mild insomnia) OR some difficulty in  
17 social, occupational, or school functioning (e.g., occasional  
18 truancy, or theft within the household), but generally functioning  
19 pretty well, has some meaningful interpersonal relationships." *DSM-*  
20 *IV*, at 32. Although the Commissioner does not use the GAF score as  
21 an indicator of disability, it is noted on review that this moderate  
22 score assessed in Dr. Pollack's narrative report is significantly  
23 inconsistent with the single marked limitation in sustained  
24 concentration and persistence noted in his Medical Source Statement.  
25 (Tr. 266.) The ALJ properly identified this unexplained  
26 inconsistency as a reason for rejecting the marked limitation. (Tr.  
27 25.)  
28

1 and unsupported by substantial evidence. *Lester*, 81 F.3d at 832.  
2 However, where, as here, the Commissioner has provided other  
3 specific, legitimate reasons, the error is harmless. *Carmickle*, 533  
4 F.3d at 1164.

5 The ALJ did not err in giving more weight to Dr. Everhart's  
6 evaluation, which was also based in part on objective test results  
7 and a review of the medical records. The ALJ summarized Dr.  
8 Everhart's and Dr. Pollack's evaluations (Tr. 19-20, 21), properly  
9 explained the weight given each report, and rejected Dr. Pollack's  
10 conclusory opinions with specific and legitimate reasons. As found  
11 by the ALJ, Dr. Everhart's opinions are "consistent with the  
12 longitudinal record." (Tr. 25, 172-76.) The resolution of  
13 conflicts in medical evidence is the responsibility of the ALJ, not  
14 the reviewing court. Where, as here, there is evidence to support  
15 both Plaintiff's and the Commissioner's interpretation of the  
16 evidence, under the case law the court cannot substitute its  
17 judgment for that of the Commissioner. Because the ALJ's reasoning  
18 is supported by substantial evidence, his findings may not be  
19 disturbed.

20 **B. RFC Determination**

21 The RFC determination represents the most a claimant can still  
22 do despite his or her physical and mental limitations. 20 C.F.R. §  
23 416.945. The RFC assessment is not a "medical issue" under the  
24 Regulations; it is an administrative finding based on all relevant  
25 evidence in the record, not just medical evidence. *Id.* The final  
26 determination regarding a claimant's ability to perform basic work  
27 is the sole responsibility of the Commissioner. 20 C.F.R. §  
28

1 416.946; SSR 96-5p. No special significance may be given to a  
2 medical source opinion on issues reserved to the Commissioner. 20  
3 C.F.R. § 416.927(e).

4 ALJ Chester's RFC determination reflects a reasonable  
5 interpretation of the medical evidence in its entirety, as well as  
6 Plaintiff's credible testimony. As discussed above, the ALJ  
7 properly rejected the single marked limitation assessed by Dr.  
8 Pollack in his summary conclusions because it was inconsistent with  
9 his narrative findings and the longitudinal record and, therefore,  
10 the ALJ relied on Dr. Pollack's narrative report findings. In  
11 addition, it is noted on review that Dr. Pollack found "no  
12 limitation" in the majority of capacities rated, findings which  
13 support the ALJ's final RFC. (Tr. 265-66.)

14 Plaintiff appears to argue the ALJ erred in not incorporating  
15 all unrejected moderate limitations noted in Dr. Bailey's RFC  
16 summary conclusions into the final RFC determination. (Ct. Rec. 14  
17 at 12; Tr. 192-93.) However, the ALJ is not required to include,  
18 verbatim, each limitation marked in a credited opinion. Here, the  
19 opinions in Dr. Bailey's summary assessment are consistent with the  
20 ALJ's final RFC determination and were duly noted in his decision.  
21 (Tr. 25.) Further, independent review shows the ALJ's final RFC  
22 findings reflect accurately Dr. Bailey's narrative functional  
23 capacity assessment, which elaborates on "the summary conclusions"  
24 of the checkbox form. (Tr. 23, 194.)

25 As found by Dr. Bailey, Plaintiff was able to understand and  
26 remember simple, detailed instructions, work in a setting with  
27 infrequent changes, and would benefit from help in planning. She  
28

1 was able to concentrate and persist and could have superficial  
2 contact with coworkers and the public. (Tr. 194.) The ALJ properly  
3 incorporated these limitations in his RFC and step five findings  
4 when he concluded Plaintiff could do a wide range of unskilled  
5 medium work with non-exertional limitations related to impaired  
6 hearing and superficial contact with the public and co-workers.  
7 Referencing SSR 83-10, he found her non-exertional limitations would  
8 not significantly erode her occupational base.<sup>3</sup> (Tr. 23, 26.) The  
9 ALJ's RFC findings represent a rational interpretation of the record  
10 in its entirety and will not be disturbed.

#### CONCLUSION

12 The Commissioner's determination of non-disability is supported  
13 by substantial evidence and free of legal error. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
16 **DENIED**;

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17       <sup>3</sup> "Unskilled work" involves simple duties that can be learned  
18 on the job and require little or no judgment. 20 C.F.R. § 416.968;  
19 *Terry v. Sullivan*, 903 F.2d 1273, 1276-77 (9<sup>th</sup> Cir. 1990). The  
20 Medical-Vocational Guidelines take notice of about 2,500 medium,  
21 light and sedentary unskilled jobs. Where non-exertional  
22 limitations would not significantly erode an occupational base,  
23 application of the Medical-Vocational Guidelines is appropriate.  
24 *Desrosiers v. Secretary of Health and Human Serv's*, 846 F.2d 573,  
25 577 (9<sup>th</sup> Cir. 1988) ("non-exertional limitations do not automatically  
26 preclude applications of the grids"); *Razey v. Heckler*, 785 F.2d  
27 1426, 1430 (9<sup>th</sup> Cir. 1986); *SSR 83-10*.

2. Defendant's Motion for Summary Judgment (Ct. Rec. 16) is  
**GRANTED.**

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED November 23, 2010.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE